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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

NO. ~~79~~ 1194

STANLEY SPIEGEL,

Petitioner,

V.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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NO.

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UNITED STATES OF AMERICA,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioner, STANLEY SPIEGEL, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The April 13, 1977 Order and Judgment of the United States District Court for the Northern District of Georgia granting Petitioner a new trial is unreported. (Appendix A, *infra*). The June 8, 1977 Order granting the Government's Motion for Reconsideration and vacating the April 13, 1977 Order granting Petitioner a new trial is unreported (Appendix B, *infra*). The October 26, 1977 Order of the United States District Court for the Northern District of Georgia denying Petitioner a new trial is unreported (Appendix C, *infra*). The October 18, 1979

Opinion of the United States Court of Appeals for the Fifth Circuit is reported as *United States of America v. Spiegel*, 604 F.2d 961 (1979) (Appendix D, *infra*). The denial of the Petition for Panel Rehearing and for Rehearing En Banc on January 2, 1980 by the United States Court of Appeals for the Fifth Circuit is unreported (Appendix E, *infra*).

JURISDICTION

The jurisdiction of this appeal is grounded in an October 18, 1979 decision of the United States Court of Appeals for the Fifth Circuit affirming the judgment of the United States District Court for the Northern District of Georgia, and the January 2, 1980 denial of a Petition for Panel Rehearing and Rehearing En Banc by the United States Court of Appeals for the Fifth Circuit. The statutory provision conferring jurisdiction for this appeal is 28 U.S.C. §1254.

QUESTIONS PRESENTED FOR REVIEW

1. WHETHER OR NOT THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT CONFLICTS WITH THE DECISION OF THIS COURT IN *SANDSTROM V. MONTANA*, ____U.S. ____, 99 S.CT. 2450 (1979); AND WHETHER PETITIONER'S FIFTH AND SIXTH AMENDMENT RIGHTS TO DUE PROCESS OF LAW AND TO THE PRESUMPTION OF INNOCENCE WERE VIOLATED BY THE THREE BURDEN-SHIFTING CHARGES GIVEN TO THE JURY BY THE TRIAL COURT.
2. WHETHER PETITIONER'S SIXTH AMENDMENT RIGHT AND STATUTORY RIGHT (RULE

23(b), FEDERAL RULES OF CRIMINAL PROCEDURE) TO A VERDICT BY A 12-MEMBER JURY WERE VIOLATED BY A VERDICT BY AN ELEVEN-MEMBER JURY WITHOUT THE DISTRICT COURT OBTAINING PETITIONER'S KNOWING, INTELLIGENT, EXPRESS CONSENT THERETO IN OPEN COURT.

3. WHETHER PETITIONER'S FIFTH AMENDMENT RIGHT TO DUE PROCESS OF LAW AND SIXTH AMENDMENT AND STATUTORY RIGHT (18 U.S.C. §3161(e) TO A SPEEDY TRIAL WERE VIOLATED WHEN, WITHOUT JURISDICTION, THE DISTRICT COURT IMPOSED SENTENCE, ALTHOUGH EARLIER UNCONDITIONALLY GRANTING A MOTION FOR NEW TRIAL.

CONSTITUTIONAL PROVISIONS INVOLVED

Fifth Amendment, United States Constitution:

> No person . . . shall be . . . deprived of life, liberty or property, without due process of law; . . .

Sixth Amendment, United States Constitution:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed, ...

STATUTES INVOLVED

Rule 23(b), Federal Rules of Criminal Procedure provides:

> *Jury of Less Than Twelve:* Juries shall be of 12 but at any time before verdict the parties may stipulate in

writing with the approval of the court that the jury shall consist of any number less than 12.

18 U.S.C. §3161(e), the "Speedy Trial" provides:

> If the defendant is to be tried again following a declaration by the trial judge of a mistrial or following an order of such judge for a new trial, the trial shall commence within sixty days from the date the action occasioning the retrial becomes final.

PREFATORY STATEMENT

All references to the record in this case, which is comprised of multiple volumes, will be numbered in numerals and will appear as the Arabic numeral followed by page reference, e.g. "(V.1:13.)"

STATEMENT OF THE CASE

On January 23, 1973, Petitioner was indicted on 32 counts of mail fraud (18 U.S.C. §1341) and one count of conspiracy (18 U.S.C. §371). Trial commenced on June 10, 1974 and on August 17, 1974, Petitioner was acquitted of conspiracy [1], but convicted of 30 counts of mail fraud by an *11-member jury.*

The significance of a verdict by 11 jurors was recognized by the District Court when, on April 13, 1977, it granted Petitioner a new trial "by reason *only* of the grounds relating to the final decision by 11 jurors *only* . . ." (Appendix A). (Emphasis added). With the vacation of that order, on June 8, 1977 and the subsequent denial of the Motion for New Trial on October 26, 1977, this issue was raised.

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[1] The Court of Appeals erroneously stated at 604 F.2d 791 that Petitioner was convicted of conspiracy.

The facts giving rise to the 11-person verdict are simple. On the first day of the trial, June 10, 1974, Government counsel and counsel for all defendants executed a written stipulation (V.50:388), waiving the twelfth juror (V.6:120) (Appendix F). The stipulation was not signed by Petitioner or any of his co-defendants. Indeed, the stipulation did not even contain a "block" for their signatures. The stipulation was executed at side bar; and the record of June 10 does not show that Petitioner had knowledge of or assented to the stipulation signed by his counsel (V.6:120).

On August 12, 1974, approximately two months into trial and five days before the jury verdict, the District Court announced that a juror was ill. Petitioner's counsel stated that he wanted the trial to conclude. The prosecutor was opposed to proceeding with 11 jurors, but the court completed the trial and received the 11-juror verdict. (V.44:3,9). The record is *silent* as to an in-court, express, and intelligent waiver of the twelfth juror by Petitioner on August 12, 1974.

On February 23, 1977, preceding the April 1977 grant of a new trial, the District Court had a hearing, *inter alia*, on this issue. The trial judge received an affidavit from Petitioner's attorney, who was on trial at that time, concerning this issue (See Appendix G). A reading of Volume 49 of the record (the hearing testimony of petitioner and two lawyers, Messrs. Tate and McQuigan, who represented the co-defendants, A. Holloway and Lawson), and Appendix G established that Petitioner never personally, expressly, and intelligently in open court waived his right to a verdict by 12 jurors. Indeed, a letter from Petitioner's law firm to him, dated May 22, 1975, admitted as an exhibit during the February hearing, demonstrates the

after-acquired knowledge of the Rule 23(b) question by Petitioner and his law firm (Appendix H). The Court of Appeals so found in its decision below at 964-65:

> There is nothing in the record to indicate conclusively that the defense counsel conferred with their clients before signing the stipulation.
>
> * * *
>
> Thus he [the District Court] made no explicit finding that defendants knew exactly what was being waived on either June 10 or August 12. Unquestionably, none gave personal assent in Court to trial by eleven jurors.

At the close of evidence, the District Court gave the following "burden-shifting instructions" to the jury:

> Now it is reasonable to infer that a person ordinarily intends the natural and probable consequences of acts knowingly done or knowingly omitted and, *unless the contrary appears from the evidence*, you, the jury may draw the inference that the accused whose case you are considering intended all the consequences which one standing in like circumstances and possessing like knowledge should reasonably have expected to result from any act knowingly done or knowingly omitted by the accused. (V.47:45) (Emphasis added).
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> * * *
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> Now it is not necessary that the prosecution prove that a defendant or any one of them knew that a particular act or failure to act is a violation of law because, *unless and until outweighed by the evidence in the case to the contrary*, the *presumption* is that every person knows what the law forbids and what the law requires to be done. (V.47:38) (Emphasis added).
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> * * *

> Now, as I have said, it is not necessary for the prosecution to prove the knowledge of the accused that a particular act or failure to act is a violation of law because, *unless and until outweighed by evidence to the contrary*, the *presumption* is that every person knows what the law is and what the law requires to be done, and evidence that the accused acted or failed to act because of ignorance of the law is to be considered in determining whether or not the accused acted or failed to act with the specific intent to commit such crime. (V.47:43) (Emphasis added).

It is noteworthy that the latter two portions of the charge to the jury used the word "presumption"; that they both went to the issue of "specific intent"; and that they were given prior to "natural and probable consequences" portion of the charge where the word "inference" rather than "presumption" was used.

On August 23, 1974, a Motion for New Trial, along with a Motion to Enlarge the Time for Filing a Motion for New Trial, was filed. The latter Motion was granted until December 15, 1974, the date on which the trial transcript was expected to be completed. However, the transcript was not finally prepared until May, 1976, because of administrative problems relating to the court reporting of the trial. On June 11, 1976, Petitioner filed an Amended Motion for a New Trial. On February 22-24, 1977, evidentiary hearings were held on the Motion for New Trial. Thereafter, on April 13, 1977, the District Court granted a new trial, setting a trial date of May 24, 1977 (Appendix A). On April 20, 1977, the Government filed a Motion for Reconsideration without the accompanying Memorandum of Law required by Local Rule 91.1 of the District Court. On May 26, 1977, the Government, out of time, filed its Memorandum of law in

support of the Motion for Reconsideration. On June 8, 1977, the District Court issued an Order granting the Government's Motion for Reconsideration and vacated its April 13, 1977 Order granting the Motion for New Trial (Appendix B). Two days later, on June 10, the District Court heard reargument on the Motion for New Trial, during which he stated: "I have attempted by my last order . . . to . . . obviate a speedy trial problem . . . ."

Thereafter, on October 26, 1977, an Order issued denying Petitioner's Motion for New Trial. Before sentencing, Petitioner filed a motion, *inter alia*, to bar sentencing, claiming that the Court lacked jurisdiction to sentence him and that his right to a speedy re-trial had been violated. This motion was denied and Petitioner was sentenced to a period of incarceration of six and one-half years, but was released on a $20,000 personal recognizance bond pending appeal.

An appeal was taken and the Fifth Circuit affirmed the District Court on October 18, 1979. A Petition for Panel Rehearing and Rehearing En Banc was denied on January 2, 1980.

REASONS FOR GRANTING THE WRIT

The decision of the United States Court of Appeals for the Fifth Circuit is in direct conflict with this Court's recent decision in *Sandstrom v. Montana*, ____ U.S. ____, 99 S.Ct. 2450 (1979), holding that burden-shifting charges are unconstitutional. The District Court gave three burden-shifting charges which individually and cumulatively violate the constitutional mandate set forth in *Sandstrom*. So that there can be no doubt that *Sandstrom* applies to the decisions of the Circuit Courts of Appeals, this Court should grant this Petition.

This Court must resolve a serious conflict between the Circuit Courts of Appeal on the issue (See Appendix I) of whether Rule 23(b), Federal Rules of Criminal Procedure, and the Sixth Amendment to the United States Constitution allow defense counsel to waive a defendant's right to a jury of twelve where the record shows no express, personal, and intelligent consent by the Petitioner in open court to a verdict by a jury of less than twelve. The United States Court of Appeals for the Fifth Circuit recognized this Circuit conflict in the Opinion below. Explication by this Court is also required to resolve whether a 12-member jury is constitutionally mandated in federal criminal cases. For these reasons, this Court should grant certiorari.

Explication from this Court is required to decide an important question of federal law which raises an issue of first impression, both in this Court and in all of the Circuit Courts of Appeals: Whether a District Court has jurisdiction to sentence Petitioner after unconditionally granting him a new trial; setting a date for re-trial within the 60-day statutory period provided for in 18 U.S.C. 3161(e) (prior to its recent amendment to 70 days); and then vacating said order just prior to the 60-day expiration period.

I. WHETHER OR NOT THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT CONFLICTS WITH THE DECISION OF THIS COURT IN *SANDSTROM V. MONTANA*, ___ U.S. ___, 99 S.CT. 2450 (1979); AND WHETHER PETITIONER'S FIFTH AND SIXTH AMENDMENT RIGHTS TO DUE PROCESS OF LAW AND TO THE PRESUMPTION OF INNOCENCE WERE VIOLATED BY

THE THREE BURDEN-SHIFTING CHARGES GIVEN TO THE JURY BY THE TRIAL COURT.

A. INTRODUCTION

The decision of the Court of Appeals significantly misinterprets this Court's recent ruling in *Sandstrom v. Montana*, ____ U.S. ____, 99 S.Ct. 2450 (1979). A Writ of Certiorari should be granted in order for the Court to correct this misunderstanding, which makes the lower court's decision in direct conflict with recent applicable authority in this Court. Supreme Court Rule 19(b).

Sandstrom v. Montana, supra, held that the jury instruction that "the law presumes that a person intends the ordinary consequences of his voluntary actions," unconstitutionally shifted the burden of proof from the prosecution to the defendant, when a specific intent is an essential element of the crime charged, thereby depriving the defendant of his constitutional rights to due process of law and the presumption of innocence.[2]

This Court remanded the case in *Sandstrom v. Montana, supra*, for consideration of whether or not the erroneous instruction could be harmless in that case in light of authority that an unconstitutional instruction as to an essential element of a crime can never be harmless. *Brotherhood of Carpenters v. United States*, 330 U.S. at 395, see also *Hammontree v. Phelps*, Fifth Circuit 79-1307 (Slip Opinion, Decided Nov. 7, 1979). The Montana Supreme Court replied by holding that the "ordinary

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[2] In so holding, this Court relied in part on *United States v. Gypsum Co.*, 438 U.S. 422 (1978), where it had disapproved the jury instructions, "the law presumes that a person intends the necessary and natural consequences of his acts." (At 430).

consequences" instruction, if erroneous, could not constitute harmless error:

> To constitute harmess error, we must be able to assent as a Court that the offensive instruction could not reasonably have contributed to the jury verdict. In considering the instruction, and the fact that intent was the main issue in the District Court trial, we cannot make that assertion. The erroneous instruction goes to a vital element of the proof of the crime, namely the intent of the defendant Sandstrom in commiting the homicide. If the jury followed the instruction, it could have presumed the intent without proof beyond a reasonable doubt. Mont. Sup. Ct., November 28, 1979.

Since the *Sandstrom* decision, this Court has consistently vacated and remanded by *per curiam* decisions, state cases involving instructions similar to the one used in *Sandstrom*. *See, Whisenhunt v. Georgia*, ____ U.S. ____ (No. 78-6179, June 27, 1979); *Moye v. Connecticut*, ____ U.S. ____ (No. 79-274, October 9, 1979); *Heads v. Louisiana*, ____ U.S. ____ (No. 79-270, January 7, 1980).

The decision in this case is one of the first lower federal court decisions interpreting *Sandstrom v. Montana, supra*, and is the only lower federal court decision which attempts to distinguish this Court's holding, *cf. United States v. Davis*, 608 F.2d 698 (6th Cir. 1979); *United States v. Hammontree, supra*. With regard to State decisions, following *Sandstrom v. Montana, supra*, see *State of Connecticut v. Harrison*, Sup. Ct. Conn. (Connecticut Law Journal, August 28, 1979); and *State v. Bryant*, Sup. Ct. Tenn. (26 Cr.L. 2016, August 20, 1979).

B. INSTRUCTIONS GIVEN

The Petitioner's defense to the complicated mail fraud charges in this case was primarily that he lacked the

specific fraudulent intent required by the statute, 18 U.S.C. §1341. At the close of the evidence, the District Court gave the following three instructions to the jury:

> Now it is reasonable to infer that a person ordinarily intends the natural and probable consequences of acts knowingly done or knowingly omitted and, *unless the contrary appears from the evidence*, you, the jury may draw the inference that the accused whose case you are considering intended all the consequences which one standing in like circumstances and possessing like knowledge should reasonably have expected to result from any act knowingly done or knowingly omitted by the accused. (V.47:45) (Emphasis added).
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> Now it is not necessary that the prosecution prove that a defendant or any one of them knew that a particular act or failure to act is a violation of law because, *unless and until outweighed by the evidence in the case to the contrary*, the *presumption* is that every person knows what the law forbids and what the law requires to be done. (V.47:38) (Emphasis added).
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> Now, as I have said, it is not necessary for the prosecution to prove the knowledge of the accused that a particular act or failure to act is a violation of law because, *unless and until outweighed by evidence to the contrary*, the *presumption* is that every person knows what the law is and what the law requires to be done, and evidence that the accused acted or failed to act because of ignorance of the law is to be considered in determining whether or not the accused acted or failed to act with the specific intent to commit such crime. (V.47:43) (Emphasis added).

The first instruction, referred to as the "Mann Charge" in the Fifth Circuit, was banned in the *en banc* decision in *United States v. Chiantese*, 570 F.2d 1244 (1977), which was the culmination of a long line of cases, beginning with *Mann v. United States*, 319 F.2d 404 (5th Cir. 1973), which found the instruction to be plain error. Although this charge had been subjected to numerous attacks, strangely enough a constitutional challenge never has been made as it was in *Sandstrom v. Montana, supra*. *Chiantese*, however, refused to apply its ban on the instruction to then-pending cases, permitting certain exceptions to the plain error rule set forth in the Fifth Circuit decisions prior to *Chiantese* to apply to cases tried prior to *Chiantese*, including consideration of the potential curative effect of other sections of the charge. The Court of Appeals here, after finding *Sandstrom v. Montana, supra*, to be inapplicable for reasons discussed in detail below, concluded that the instruction did not raise constitutional issues and, therefore, applied the pre-Chiantese exceptions because the *Spiegel* instructions were given prior to *Chiantese*.

C. CONSTITUTIONALITY

As noted above, although the cited instructions had been challenged for 14 years prior to *Chiantese*, the question of whether the charge raised a constitutional issue was never addressed in any Fifth Circuit opinion, including *Chiantese en banc, supra*.

The constitutionality issue, however, was squarely faced in *Sandstrom v. Montana, supra*, where this Court held that the charge in question, even if it did not state a conclusive presumption on a necessary element of the crime charged, "had the effect of shifting the burden of

pursuasion to the defendant," thus depriving him of his constitutional right not to be convicted unless "every fact necessary to constitute the crime with which he is charged" is proved beyond a reasonable doubt. *See, also, In re: Winship,* 397 U.S. 358, 364 (1970). Moreover, *Sandstrom* makes it clear that in order to raise a constitutional question, it is not ncessary that the instructions inevitably result in burden-shifting. It is sufficient if the instructions create only a "possibility" that a "reasonable juror" could have given the instruction a burden-shifting effect. (Slip Opinion at 48.) Also, contrary to the Fifth Circuit's *Chiantese en banc, supra,* decision, *Sandstrom* holds that other portions of the instructions cannot cure such erroneous charges (Slip Opinion at 47, fn. 7). This is key because the Circuit Court of Appeals here found the admitted erroneous instruction nevertheless not to constitute error, because of other supposedly curative instructions.

The Fifth Circuit attempted to distinguish *Sandstrom* by emphasizing that *Spiegel* involved an "inference unless the contrary appears from the evidence" charge, while *Sandstrom* involved a "presumption" charge holding that this distinction results in a charge not sufficiently burden-shifting to raise the constitutional issue and therefore require reversal under *Sandstrom's* mandate, *United States v. Spiegel,* 604 F.2d at 968.

Such a fine distinction is not consistent with this Court's reasoning in *Sandstrom,* which includes a citation to the Fifth Circuit *Chiantese en banc* decision, involving not a "presumption charge" but an "inference unless contrary evidence" charge, as a sample of a type of burden-shifting charge found to be unconstitutional because the charge raised the *possibility* that a reasonable juror could have

concluded that there was a judicial direction "to find intent upon proof of the defendant's voluntary actions and thus 'ordinary' consequences, unless *the defendant* proved the contrary by some quantum of proof which may have been considerably greater than 'some evidence.' " (Slip Opinion at 74) (Emphasis added).

Curiously, even though *Sandstrom* and *Chiantese en banc* make no distinction between a "presumption" charge and an "inference" charge *when the effect is to shift the burden*, the District Court here also gave "presumption" charges prior to giving the charge specifically barred in *Chiantese en banc*. Both of these "presumption" charges also went to the issue of specific intent, an element of the crime of mail fraud which must be proved beyond a reasonable doubt:

> Now it is not necessary that the prosecution prove that a defendant or any one of them knew that a particular act or failure to act is a violation of law because, unless and until outweighed by the evidence in the case to the contrary, the *presumption* is that every person knows what the law forbids and what the law requires to be done. (V.47:38) (Emphasis added.)
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More important, however, the "presumption/inference" distinction is, in fact, no distinction at all. As was aptly stated by Judge Gewin in *Mann v. United States*, 319 F.2d 404, 409 (5th Cir. 1973):

> When the words, 'So unless the contrary appears from the evidence' were introduced, the burden of proof was thereupon shifted from the prosecution to the defendant to prove lack of intent. *If an inference from a fact or set of facts must be overcome with opposing evidence, then the inference becomes a presumption and places a burden on the accused to overcome that presumption.* Such a burden is especially harmful when a person is required to overcome a presumption as to anything subjective, such as intent or willfulness, and a barrier almost impossible to hurdle results. (Emphasis added.)

If the instructions complained of merely stated a permissive inference, there might be no problem, but here they urged both a presumption and an inference unless the contrary appears from the evidence. Judge Gewin's reasoned analysis, coupled with the two "presumption" charges given in *Spiegel*, leads to only one logical conclusion: that *Sandstrom v. Montana*, *supra*, must apply to the *Spiegel* charges challenged in this petition.

This distinction between a "mere inference" charge and an "inference unless the contrary appears from the evidence charge," was made clear in the recent decision of the Sixth Circuit Court of Appeals, in *United States v. Davis*, 608 F.2d 699 (6th Cir. November 2, 1979). There the Court notes that it is the additional clause "unless the contrary appears from the evidence" which causes the inference that a person "intends the natural and probable consequences" instruction to become potentially burden shifting. This analysis was also followed, even before

Sandstrom v. Montana, in *U.S. v. Robinson*, 545 F.2d 301, 305, 306 (2nd Cir. 1976) where the charge was almost identical to that given in this case. *See, also, U.S. v. Bertolotti*, 529 F.2d 149, 159 (2nd Cir. 1975), where a very similar charge was disapproved.

The confusion that the Court of Appeals decision here brings to this area is highlighted by another recent decision of the Fifth Circuit, interpreting *Sandstrom v. Montana, supra.* In *Hammontree v. Phelps, supra*, a different Fifth Circuit Panel held that an instruction which under Louisiana law created only an inference as to an element of the crime charged nevertheless required reversal under *Sandstrom* because in the context of the charge as given emphasis was placed on the right of the accused to present contrary evidence and "a reasonable juror" could have concluded, as in *Sandstrom*, that the inference created "a mandatory presumption," requiring the defendant to offer evidence, therefore shifting the burden of persuasion. The *Hammontree* Panel specifically noted that the trial judge did not inform the jury that the charge placed no "affirmative burden upon the accused."

The charge given here runs the same risk of burden-shifting as that given in *Hammontree* because it has the potential of leading jurors to believe that the defendant has some burden of disproving intent. Moreover, the *Hammontree* charge may have been less dangerous to the defendant's rights than the charge here because it was followed *immediately* by a reminder by the judge that the defendant still enjoyed the "presumption of innocence" and that the prosecution must prove criminal negligence beyond a reasonable doubt. Here, the erroneous charge was not followed immediately by any reference to the presumption of innocence or the burden of proof.

Therefore, this case presents an even stronger case for reversal than *Hammontree*.

Why one Panel of the Fifth Circuit would reverse in *Hammontree* and another Panel affirm a similar instruction here remains unexplained, although most recently in *Trunkline Gas Co. v. Federal Energy Commission*, 608 F.2d 582, 583 (1979), the Fifth Circuit unequivocally stated that a panel of the Court of Appeals must follow decisions of other panels. Although this disparity was brought to the attention of the Fifth Circuit in a Petition for Rehearing and Rehearing En Banc, Petitioner received no relief. If nothing else, the apparent split between *Hammontree* and *Spiegel*, within the *same Circuit*, highlights the continuing confusion in this area, calling for further clear direction from this Court.

In short, the distinction between this case and *Sandstrom* made by the Court of Appeals is a distinction without a difference. It is a significant misinterpretation of this Court's decision in *Sandstrom v. Montana*, *supra*, which emphasizes that an instruction need not inevitably result in burden shifting. The possibility that the jury may give an instruction such an effect is sufficient to raise the constitutional issue. Here the possibility of such an effect is clear and the writ should be granted in order that this Court may correct the improper interpretation of *Sandstrom v. Montana*, *supra*, made by the Court of Appeals here.

D. **RETROACTIVITY**

Whether or not *Sandstrom* should be applied retroactively has not previously been dealt with by this Court, which has merely remanded cases to lower courts which had not considered *Sandstrom* in their decisions. In the

Opinion below, the Court held, in the alternative, that even if the complained of instruction was improper under *Sandstrom v. Montana,* that the holding of *Sandstrom* should not be applied retroactively, citing *Adams v. Illinois,* 405 U.S. 278 (1975) with regard to the retroactivity of a "new" constituted rule. Accordingly, the issue of retroactivity is now ripe for consideration by this Court. Clarification of such an unresolved issue in an important area of federal law is an additional reason to grant this Writ. Supreme Court Rule 19(b).

What is particularly disturbing about the Fifth Circuit Opinion is that its retroactivity analysis is so cursory, apparently holding that *Sandstrom* is "new law", that it ignores a whole line of authority in this Court with regard to the retroactivity of decisions regarding burden shifting jury instructions.

First of all, *Sandstrom* is not "new law". It is merely an extension of the previously well-settled rule that the burden on the government to prove every essential element of a crime beyond a reasonable doubt is a constitutional right, *In Re: Winship,* 397 U.S. 358 (1970), and that jury instructions in any way eliminating or shifting that burden result in a deprivation of that constitutional right. *Wilbur v. Mullaney,* 421 U.S. 684 (1975); and *Morrissette v. U.S.,* 342 U.S. 246 (1952). Thus, even under *Adams,* retroactivity is proper.

Secondly, even if *Sandstrom* is new law, the Fifth Circuit ignores precedent in this Court specifically on point: *Hankerson v. North Carolina,* 432 U.S. 233 (1977) and *Ivan V v. City of New York,* 407 U.S. 233 (1977).

One of the primary authorities upon which *Sandstrom* relies is *Wilbur v. Mullaney,* 421 U.S. 684 (1975), in which

the Supreme Court found a burden-shifting charge with regard to the finding of malice aforethought in a murder case to be an unconstitutional shifting of the burden of proof. *Hankerson v. North Carolina*, *supra*, dealt directly with whether or not the rule set down in *Mullaney* should apply retroactively. Citing *Ivan V v. City of New York*, *supra*, which held *In Re: Winship*, *supra*, the watershed reasonable doubt standard case, to be retroactive, *Hankerson* held that "where the major purpose of new constitutional doctrine is to overcome an aspect of the criminal trial that substantially impairs its truth-finding function and so raises serious questions about the accuracy of guilty verdicts in past trials, the new rule [is] given *complete* retroactive effect." (At 243) (Emphasis added.)

Hankerson deals directly with the issue of "impact on the administration of justice," at 242, mentioned in passing by the Fifth Circuit, but refuses to deviate from the rule in *Ivan V* that constitutional violations undercutting the reasonable doubt standard substantially impair the truth-finding function of the trial and necessitate retroactive application of the constitutional rule, whether "new" or not.

In short, the analysis of the Fifth Circuit decision covering retroactivity is inaccurate, ignoring contrary precedent in this Court. Accordingly, this Writ should be granted in order for this Court to correct such a mistaken decision on an important and novel issue in federal law.

E. CONCLUSION

The Fifth Circuit has misinterpreted this Court's holding in *Sandstrom v. Montana*, *supra*, by creating a distinction not intended by this Court. Moreover, the Fifth Circuit has wrongly decided the retroactivity question.

This case is, therefore, a proper case for this Court to exercise its discretion under Rule 19(b) in order to remove the confusion in the law on an important issue which has been created by the Circuit Court of Appeals in this case.

II. WHETHER PETITIONER'S SIXTH AMENDMENT RIGHT AND STATUTORY RIGHT [RULE 23(b), F.R.Cr.P.] TO A VERDICT BY A 12-MEMBER JURY WERE VIOLATED BY A VERDICT BY AN 11-MEMBER JURY WITHOUT THE DISTRICT COURT'S OBTAINING PETITIONER'S KNOWING, INTELLIGENT, AND EXPRESS CONSENT THERETO IN OPEN COURT.

A. INTRODUCTION

The precise issue presented here has never been decided by this Court; a resolution of this question is necessary so that the current conflict between the Circuit Courts of Appeals (See Appendix I) may be resolved, and so that this critical constitutional and statutory right receives a reasoned explication. See Supreme Court Rule 19(b).

The significance of this issue was first recognized by the District Court itself when, on April 13, 1977, it granted Petitioner a new trial "by reason *only* of the grounds relating to final decision by eleven jurors only. . . ." (Appendix A). (Emphasis added). With the vacation of that Order on June 8, 1977, and the subsequent denial of the Motion for New Trial on October 26, 1977, this issue was raised.

The precise issue here is whether Rule 23(b) and the Sixth Amendment allow counsel to waive Petitioner's

right to a verdict of a jury of twelve where the record below clearly shows that the accused was not consulted nor personally and intelligently consented to his counsel's actions. The Fifth Circuit held the conduct of counsel "served to waive any objection the appellants might have to proceeding with eleven jurors." (At 966). This holding, not supported by the record, is incompatible with prior analogous decisions of this Court and with the majority precedent in other Circuit Courts of Appeal.[3] Moreover, the Fifth Circuit incorrectly analyzed the effect of *Patton v. United States*, 281 U.S. 276 (1930) and *Williams v. Florida*, 399 U.S. 78 (1970) on Rule 23(b).[4] Finally, this Court has never rendered a decision interpreting this Rule 23(b) issue in the context of *Patton* and *Williams;* this is most critical to the administration of criminal justice in that it requires explication of Petitioner's constitutional and statutory right to a twelve-person jury verdict.

B. *PATTON V. UNITED STATES, SUPRA*, REQUIRES AN "EXPRESS AND INTELLIGENT CONSENT BEFORE A VALID WAIVER OCCURS."

Patton held that there may be a waiver of twelve:

> [B]efore any waiver can become effective, the consent of government counsel and the sanction of the court

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[3] The decisions in the Second, Fourth, Sixth, Ninth, Tenth and D. C. Circuits support Petitioner's contention. (See Appendix I for a complete list of citations involving Circuits expressing the majority and minority view.)

[4] The Fifth Circuit in footnote 9, at page 965, states that *Williams v. Florida, supra*, may have overruled *Patton sub silentio*. Petitioner disagrees, as *Williams* clearly does not reach the *Patton* holding; moreover, *Patton's* language "requiring express and intelligent consent" would still be controlling on the issue of waiver regardless of the impact of the issue of whether a 12-member jury is constitutionally mandated.

> must be had, *in addition to the express and intelligent consent of the defendant.* (At 312-13) (Emphasis added).

The *Patton* decision has never been overruled. It antedates the Rules of Criminal Procedure, and was a direct interpretation of the Sixth Amendment. *Patton* was later codified into Rule 23(b). The note of the Advisory Committee states that Rule 23(b) "is a restatement of existing practice, the *constitutionality* of which was approved in *Patton.*" (Emphasis added).

Patton's mandate emphatically requiring "the express and intelligent consent of the defendant" was not adhered to in the Fifth Circuit's holding, although the facts found by the Court of Appeals support Petitioner's contention that the waiver standards set forth in *Patton* were not met in this case.

Thus, further explication by this Court is necessary to resolve whether *Williams* does overrule *Patton* and if *Patton* was overruled, and this is not conceded by Petitioner, then an explication of Rule 23(b) must be undertaken by this Court to decide what type of waiver is required from Petitioner before a verdict by a jury of less than twelve can be received.

C. IT IS UNDISPUTED THAT PETITIONER DID NOT EXPRESSLY, INTELLIGENTLY AND PERSONALLY CONSENT TO A WAIVER OF THE 12-MEMBER JURY.

The Fifth Circuit found no oral or written, express, intelligent and personal waiver:

> There is nothing in the record to indicate conclusively that defense counsel conferred with their

clients before signing the stipulation. (At 964).

* * *

. . . he [the trial court] made no explicit finding that the defendants knew exactly what was being waived on either June 10 or August 12. Unquestionably, none gave personal assent in court to trial by eleven jurors. (At 964).

D. THE FIFTH CIRCUIT'S RELIANCE ON *UNITED STATES V. PACENTE; HORNE V. UNITED STATES; UNITED STATES V. BEATTY;* AND *WILLIAMS V. FLORIDA* IS IN ERROR.

The Court of Appeals cites *United States v. Pacente*, 503 F.2d 543 (7th Cir. 1974), clearly the minority view. Several other Circuits representing the majority view have construed the words "parties may stipulate in writing" of Rule 23(b) to mean the express consent of the defendant himself in open court. See *United States v. Taylor*, 498 F.2d 390 (6th Cir. 1974); and *United States v. Guerrero-Peralta*, 446 F.2d 876, 877 (9th Cir. 1971):

> Express consent given orally by the defendant personally and appearing on the record may be equally good evidence but that much, as a minimum, must appear.

Thus, a stipulation, orally or in writing by defense counsel, does not satisfy the Rule and the constitutional safeguards on which it was founded. See also *United States v. Reyes*, 603 F.2d 69 (9th Cir. 1979). Indeed, until this case was decided, it appeared that the Fifth Circuit also followed the majority view. The decision in *United States v. Smith*, 523 F.2d 788 (5th Cir. 1975) was presented to the Court of Appeals below as precedent for Peti-

tioner's position that his express consent given orally in open court was required before a verdict of less than twelve could be received. Petitioner argued that *Smith's* language at 791 was controlling:

> [A] signed stipulation is not indispensibly required for compliance with Rule 23(b). An oral stipulation will suffice *if the defendant intelligently and personally consents.* (Emphasis added).

The Fifth Circuit itself recognized the conflict in its own decisions and between the Circuits at 965-966:

> Precedent in our own Circuit leaves *us in some doubt* as to which of the above lines of cases [from the other Circuits] we should follow. Only our recent decision . . . in Smith . . . stands in the way of our holding that the agreements entered into by counsel in this case satisfy Rule 23(b). Smith appears to require the express, personal consent of the defendant . . . ."

The Fifth Circuit then proceeded to reject *Smith, supra,* without expressly overruling it by favorably citing *United States v. Pacente, supra,* the Seventh Circuit minority view opinion; *Horne v. United States,* 264 F.2d 40 (5th Cir. 1959), a 20-year-old collateral attack case which had been rejected by that very Court in *Smith, supra,* at 791, n.1; *United States v. Beatty,* 477 F.2d 181 (5th Cir. 1967), a case decided eight years before *Smith* which addressed the issue of a verdict by a jury of less than twelve without even referring to Rule 23(b) and with *only one paragraph* devoted to an analysis of that issue; and *Williams v. Florida, supra,* an opinion of this Court which Petitioner contends does not reach the jury considerations presented in this federal case.

Petitioner submits that *Smith, supra,* is clearly the more reasoned decision which should have been followed

by the Fifth Circuit Panel which issued the opinion below,[5] and that the majority rule established by the decisions in the Circuits cited in Appendix I should be adopted by this Court.

Additionally, another Fifth Circuit opinion, *United States v. Taylor*, 507 F.2d 166 (1975) on this issue (inexplicably omitted from the opinion below) holds that Rule 23(b) in and of itself contains such a fundamental right that an accused "may not be deprived of the right without his express and intelligent consent." (At 168). Perhaps even more significant is the decision of *Sincox v. United States*, 571 F.2d 876 (1978), where the Fifth Circuit, citing with approval to Rule 23(b) cases, *United States v. Taylor, supra* (5th Cir.) and *United States v. Taylor, supra* (6th Cir.), noted: "Both convictions were reversed for lack of *express consent of the defendant himself*, intelligently and knowingly aware." (At 878) (Emphasis added).

It is noteworthy that in the decision below, in footnote 9, at 965, the Court of Appeals stated:

> Even, if the number 12 is still constitutionally dictated, we find numerous circumstances in which actions by counsel to waive constitutional rights have bound their clients. See, e.g., *Estelle v. Williams*, 425 U.S. 501 . . . *Winters v. Cook*, 489 F.2d 174 (5th Cir. 1973) . . . .

Obviously, the Fifth Circuit overlooked its own statement in *Sincox, supra*, at 878-79, that the 12-juror Rule

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[5] In *Trunkline Gas Co. v. Federal Energy Regulatory Commission*, 608 F.2d 582, 583 (12/17/79) the Fifth Circuit has stated that: ". . . a panel of this Court must follow the decisions of prior panels, so the [prior] decision controls this case. Thus, the above quoted language of Smith should have resulted in a reversal of this case in the opinion below.

23(b) waiver issue was a "fundamental right," citing *Johnson v. Zerbst*, 304 U.S. 458 (1938), distinguished from other rights such as compulsion to wear prison garb. Indeed, *Winters v. Cook*, at 179, the Fifth Circuit, *en banc*, stated that although the issue related to an objection to racial composition of a jury which was there held not a fundamental right, ". . . the right to waive trial by jury . . . was such a fundamental right . . .," requiring a personal waiver of the defendant.

E. CONCLUSION

Most recently, in *United States v. Reyes*, 603 F.2d 69 (1979), the Ninth Circuit supported Petitioner's contention, and went even further than prior majority view cases by stating: ". . . the . . . expression of consent on the record must appear at the time the stipulation is made and not at some subsequent point . . . ." (At 71). Petitioner submits that the policy consideration announced in *Reyes* and the other majority opinions are most compelling. In the context of this case, where the opinion below contains a finding of fact that the Petitioner did not make an express, personal, intelligent waiver in open court, those policy considerations make this an appropriate case for granting ceriorari so that the conflicting Circuit authority can be resolved by a decision of this Court, and so that this Court can resolve whether a 12-man federal jury is constitutionally mandated. See Supreme Court Rule 19(b).

III. WHETHER PETITIONER'S FIFTH AMENDMENT RIGHT TO DUE PROCESS OF LAW AND SIXTH AMENDMENT AND STATUTORY RIGHT [18 U.S.C. §3161(e)] TO A SPEEDY TRIAL WERE VIOLATED WHEN, WITHOUT JURISDICTION, THE DISTRICT COURT IMPOSED SENTENCE, ALTHOUGH EARLIER UNCONDITIONALLY GRANTING A MOTION FOR NEW TRIAL.

A. DUE PROCESS VIOLATION

The Fifth Circuit observed that "cases are scarce that bear on [this] contention and *none* are directly apposite." *United States v. Spiegel, supra,* at 971. Indeed, Petitioner's research reveals no authority of this Court or any Circuit Court of Appeals that is directly on point. Thus, this issue raises a *novel question of first impression.* See Supreme Court Rule 19(b).

On April 13, 1977, the District Court granted Petitioner a new trial, "by reason of the grounds relating to final decision by eleven jurors *only.*" (Appendix A) (Emphasis added). On April 20, 1977, the Government filed a Motion for Reconsideration. It failed, however, to file a brief in support of its motion until May 26, 1977, 36 days later. This violated the Court's order that the Government's brief be filed by May 9, 1977 and Local Rule 91.1 (V.52:1406-09). On June 8, 1977, the District Court vacated the April 13 New Trial Order, stating that it would reconsider the entire matter (Appendix B). It offered no reason whatsoever for this action in the Order Granting Reconsideration. However, the reason for this action became clear two days later on June 10, during oral reargument, when the Court stated: "I have attempted by my last order

. . . to . . . obviate a speedy trial problem. (V.49). It is a strange coincidence that the Court vacated its Order Granting a New Trial only two days prior to the expiration of the *mandatory* 60-day limit for re-trial provided by the Speedy Trial Act under 18 U.S.C. §3161(e). Indeed, the Court had set a May 24 trial date and ordered all counsel to avoid scheduling conflicts ". . . as this case is governed by the Speedy Trial Act and must be tried expeditiously." (Appendix A). Thus, there can be no doubt that the reason the new trial order was vacated was because of the Court's concern over the Speedy Trial Act [§3161(e)], setting a 60-day non-discretionary time limit for re-trial.

On October 26, 1977, the Court entered an Order Overruling Motions for New Trial (Appendix C). In this Order the Court for the first time made mention of the recent Fifth Circuit *Chiantese* decision. (See Issue I, *Supra*, pp. 11 to 22). The *Chiantese* decision, relating to the "natural and probable consequences" instruction, had not been a basis for the grant of the Motion for New Trial. As previously indicated, the 11-man jury issue had provided an independent basis for granting the new trial. There was no change of fact or law on this issue from the time the new trial was granted to the time it was denied. There is only one explanation for the District Court's reversal of its decision to grant a new trial; it simply changed its mind.

Petitioner contends that when the District Court entered its Order Granting the Motion for New Trial, the jury verdict was rendered null and void. The Court, therefore, did not have jurisdiction to reinstate the jury verdict and sentence Appellant; it could only proceed with a new trial.

Coincidentally, there is one Fifth Circuit Court of Appeals decision which speaks, in part, to this issue, although it is factually distinct. In *United States v. Spinella*, 506 F.2d 426 (1975), the Court held that once a second trial has begun, the trial court *does not* have the power to vacate its new trial order and reinstate the original conviction. While this holding is not "directly apposite" to the present case, the *Spinella* panel did state that, "The order granting the new trial *necessarily has the effect of vacating the judgment* of conviction rendered in the earlier trial." (At 430.) (Emphasis added.) The decision below inferred, without comment, that *Spinella* involved a judgment of conviction while the present case involved only a jury verdict. If this distinction has any relevance at all, its effect is precisely the opposite of that inferred by the Fifth Circuit. The trial judge has judicial control over entry of a judgment; he does not have similar control over a jury verdict. Therefore, a judicial reinstatment of a jury verdict usurps the jury's function. Indeed, one policy reason offered by Petitioner in his brief and during oral argument before the Panel was the preservation of the jury function.

Although Petitioner's research reveals no other Circuit Courts of Appeals authority on this precise issue, various state courts have spoken to this question. there are several decisions directly on point. None were considered in the decision below. In *State v. Bullock*, 269 So.2d 824 (La. 1972), the Supreme Court of Louisiana reached the same conclusion as *Spinella, supra,* on facts almost identical to Petitioner's case. In *Bullock*, the defendant was convicted of murder and was sentenced to death. Four years later, the same court granted habeas corpus relief and ordered a new trial because of the Supreme Court's decision in

Witherspoon v. Illinois, 391 U.S. 510 (1968). When the case came up for new trial, during a motion for continuance, the judge learned that the Louisiana Supreme Court had held that the proper remedy was to change the penalty from death to life imprisonment, and not a new trial. The trial court, therefore, set aside its order granting the new trial, reinstated the original conviction and sentenced the defendant to life. The Court, in reversing, stated:

> Both parties correctly contend that the trial court was without authority to rescind, over objection, the order which had granted a new trial and which had set aside the previous conviction and sentence. Since not only the sentence *but also the verdict* was set aside by the now-final order granting the new trial, the trial court was without authority to impose a life sentence; for to be valid, a sentence must rest upon, inter alia, a valid and sufficient verdict. *Id.* at 825 (Emphasis added).

This decision correctly emphasizes the error in the decision below. The inferential distinction between a judgment of conviction and a verdict overlooks the obvious. A reinstatement of a judgment necessarily reinstates the verdict as well. Regardless of whether the trial court reinstated the judgment, as in *Spinella*, or merely the verdict, as in *Spiegel*, it, nevertheless, usurped the jury's function.

Another policy reason supporting Petitioner's position is finality. This precise question was addressed in *Burton v. Florida*, 296 So.2d 79 (Fla. App. 1974). In that case, after the jury returned a guilty verdict, but prior to entry of a judgment, the trial court granted a new trial. The State filed a motion for rehearing despite the absence of any provision providing for such a motion. The trial court upon rehearing vacated its original order and denied

the motion for new trial. The Florida District Court of Appeals reasoned that since the defendant has only a limited time to move for a new trial, "it does not seem unreasonable to require the State to be prepared to refute the allegations of the motion at the hearing on the motion." (At 80). Otherwise there could be an endless procession of motions for reconsideration. If the State is permitted to seek reconsideration of the order granting a new trial, then presumably, the defendant may then seek reconsideration of the second order denying the motion *ad infinitum*. There would be no finality. Therefore, the Court held:

> [W]here a defendant has timely moved for a new trial and the matter has been heard upon the merits and thereafter an order entered either granting or denying the motion, absent fraud or clerical error, the Court is *without authority* to entertain or consider a petition for rehearing addressed to such order. *Id.* at 80.

In this case, as in *Burton*, there is no evidence of fraud or clerical error. Prior to granting the new trial, there was a three-day factual hearing on the 11-man jury issue. While the facts were still fresh in the Court's mind it granted Petitioner a new trial. Over six months later, with no change in the facts or the law, the Court changed its mind. There are strong policy reasons for denying the Court the power to reverse itself in such a manner. The parties and the Court's interest in finality is one of these reasons. The order granting the new trial was unconditional; nothing more could be done to make the order any "more final."

Both *State v. Bullock, supra*, and *Burton v. Florida, supra*, represent the majority view among the state courts that have decided this issue. *See, State v. Lubosky,*

59 R.I. 493, 196 A. 395; *Alexander v. State*, 129 Tex. Cr. R. 500, 89 S.W.2d 411. (1936); *United R. Co. v. Superior Corp.*, 170 Ca. 755, 151 P. 129; *Hahn v. Yackley*, 84 Nev. 49, 436 P.2d 215 (1968); *Luke v. Coleman*, 38 Utah 383, 113 P. 1023; *Coyle v. Seattle Electric Co.*, 31 Wash. 181, 71 P. 733. The cases just cited hold that the trial court cannot reinstate a "judgment of conviction" once a new trial is granted. Petitioner is in a better position to argue this point since no *judgment of conviction* was ever entered. In withdrawing the new trial order, the District Court resurrected the jury's verdict, something he had no control over in the first place. The notion that a judge has the inherent power to modify and vacate his *own* decree and judgments should not apply to the verdict of the jury.

The District Court could not and should not have entertained the Government's Motion for Reconsideration. At the moment the new trial was granted, the *only* further event that could occur was a new trial. There was no *final* decision from which the Government could appeal. Neither a denial nor granting of a motion for new trial has been held to be appealable. See *Gilliland v. Lyons*, 278 F.2d 56, 58 (9th Cir. 1960); *Frank Mercantile Corp., et al. v. Prudential Ins. Co. of America*, 115 F.2d 496, 497 (3rd Cir. 1940);[6] *Richardson v. U.S.*, 360 F.2d 366, 369 (5th Cir. 1966); *Gray v. U.S.*, 299 F.2d 467 (D.C. Cir. 1962).

Two of this Court's decisions, *U.S. v. Ayres*, 76 U.S. 608, 9 Wall. 608 (1870) and *U.S. v. Young*, 94 U.S. 153 (1876), support Petitioner's position although the Court was ruling on the issue of whether judgments granting

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[6] 'So far as the finality of the Order granting a new trial is concerned, it left the case as if it had never been tried. (At 497).

new trials were final, appealable orders. Thus, in *Young*, the Court, citing *Ayres*, stated at 153:

> . . . but it was held *'that the order granting a new trial has the effect . . . to render it* [the jury verdict] *null and void;'* . . . (Emphasis added.)

Accord, Kingman & Co. v. Western Mfg. Co., 170 U.S. 1192 (1897).

Thus, the action of the District Court deprived Petitioner of his Fifth Amendment right to due process of law.

B. **SPEEDY TRIAL**

Section 3161(e) of the Speedy Trial Act provides:

> *If the defendant is to be tried again following a declaration by the trial judge . . . for a new trial, the trial shall commence within 60 days from the date the action* occasioning the new trial becomes final. (Emphasis added.)

Since the unconditional new trial order occured on April 13, Petitioner had to be retried by June 12, 1977. The Court could not reinstate the jury verdict after unconditionally granting a new trial; thus, the Court was without jurisdiction to sentence Petitioner; moreover §3161(e) of the Speedy Trial Act prohibited the Government from retrying him.[7]

[7] It is significant that Local Rule 91.1 of the District Court required the Government to file a memorandum of law in support of its Motion for Reconsideration of the order granting a new trial. Local rules promulgated by the District Court must be followed. Here, a lapse of 36 days occurred until the Government filed a memorandum in support of its Motion for Reconsideration. Rule 45(b), Federal Rules of Criminal Procedure, provides, *inter alia:* ". . . but the Court may not enlarge the period for taking any action under Rules 33, 34 and 35, except as otherwise provided in these rules, or the period for taking an appeal." Rule 33 is entitled "New Trial." Reading Rule 33 and Rule 45(b) together, it was error for the District Court to even entertain the Motion for Reconsideration. *See, U.S. v. Robinson*, 361 U.S. 220 (1960). This error was compounded by the Government's failure to timely file its memorandum supporting the

Thus, this issue presents a novel question of first impression on an issue never decided by this Court or any Circuit Court. Certiorari should be granted to resolve this question critical to the administration of justice in the federal courts. See Supreme Court Rule 19(b).

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motion for reconsideration. Arguing by analogy, this Court's decision in *National Hockey League v. Metropolitan Hockey League, Inc.*, 427 U.S. 639 (1976), should apply to the Government's inaction in this case: "Under the circumstances of this case we hold that the district judge did not abuse his discretion in finding bad faith on the part of these respondents, and concluding that the extreme sanction of dismissal was appropriate in this case by reason of respondent's 'flagrant bad faith' and their counsel's 'callous disregard' of their responsibilities. Therefore, the petition for a writ of certiorari is granted and the judgment of the Court of Appeals is reversed." (At 643)

CONCLUSION

Based on the foregoing reasons, Petitioner contends that the United States Court of Appeals for the Fifth Circuit erred in its decision below in that it failed to apply the mandate of *Sandstrom v. Montana*, ____ U.S. ____, 99 S.Ct. 2450, to the challenged instructions here presented; in that it incorrectly applied *Patton v. United States*, 281 U.S. 276 (1930), and Rule 23(b), Federal Rules of Criminal Procedure, by deciding that counsel could waive Petitioner's right to a verdict by a jury of twelve. This holding failed to recognize that such a waiver is a fundamental right requiring the express, intelligent, knowing consent of the Petitioner in open court, and demonstrates a clear conflict between the Fifth Circuit and several other circuit courts (see Appendix I); and in that it incorrectly held that the District Court had jurisdiction to vacate a prior order unconditionally granting Petitioner a new trial, thus raising an issue of first impression never decided by this Court or any Circuit Court of Appeals. See Supreme Court Rule 19(b). Therefore, a Writ of Certiorari should issue to review the judgment of the Fifth Circuit Court of Appeals.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this date served three copies of the within and foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit upon the Solicitor General, Department of Justice, Washington, D. C. 20530, pursuant to United States Supreme Court Rule 33(2)(a) by depositing same in the United States Mail in a properly addressed envelope with adequate postage thereon.

This the 31st day of January, 1980.

/s/ EDWARD T. M. GARLAND
EDWARD T. M. GARLAND

/s/ MARK J. KADISH
MARK J. KADISH

/s/ JOHN R. MARTIN
JOHN R. MARTIN
Attorneys for Petitioner

Appendices

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES v. STANLEY SPIEGEL, et al.	CRIMINAL ACTION NO. 27972

FILED: April 14, 1977

ORDER GRANTING NEW TRIAL

Defendants' motion for new trial is granted by reason only of the grounds relating to final decision by eleven jurors only. While there are substantial other issues raised, the Court would not grant a new trial on the basis of any one of them, but the Court must, of course, keep in mind that in the Court of Appeals, a ground for new trial, even though inadequate in itself, may have a tandem or enhancing effect. *U. S. v. Williams*, 523 F.2d 1203 (1975).

The case is declared on trial before this Court on Tuesday, May 24, 1977, at 10:00 a.m.

All parties and counsel are hereby directed to avoid and eliminate any conflicts as this case is governed by the Speedy Trial Act and must be tried expeditiously.

SO ORDERED, this 13 day of April, 1977.

/s/ CHARLES A. MOYE, JR.
United States District Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES v. STANLEY SPIEGEL, et al.	}	CRIMINAL ACTION NO. 27972

FILED: June 9, 1977

ORDER GRANTING RECONSIDERATION

The government's motion seeking reconsideration of this Court's order of April 14, 1977, granting a new trial is hereby granted, the order of April 14, 1977, is hereby vacated, and the Court will reconsider defendants' motion for new trial on the merits and its opinion and decision with respect thereto will be by subsequent order.

Any further matters which the parties desire to call to the attention of the Court prior to the issuance of said order will be considered at the hearing now scheduled for Friday, June 10, 1977, at 1:30 p.m.

This 8 day of June, 1977.

/s/ CHARLES A. MOYE, JR.
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES v. STANLEY SPIEGEL, et al.	}	CRIMINAL ACTION NO. 27972

FILED: October 27, 1977

ORDER OVERRULING MOTIONS FOR NEW TRIAL

On April 13, 1977, this Court granted defendants' motions for new trial "by reason only of the grounds relating to final decision by eleven jurors only." The Court further stated: "While there are substantial other issues raised, the Court would not grant a new trial on the basis of any one of them, but the Court must, of course, keep in mind that in the Court of Appeals, a ground for new trial, even though inadequate in itself, may have a tandem or enhancing effect. *U. S. v. Williams*, 523 F.2d 1203 (1975)."

As subsequently indicated to the parties, the Court's concern in this area was its "Mann" type charge given in this case in 1974. This Court's charge had subsequently been considered, in 1976, by the Court of Appeals in *U. S. v. Duke*, 527 F.2d 386 (1976), where the charge was criticized, but the conviction affirmed. However, in *U. S. v. Chiantese*, 546 F.2d 135 (January 28, 1977), the Court of Appeals so emphatically condemned the use of the Mann charge that it appeared to the Court that, despite the previous holding that this Court's use of the Mann charge in the context of the other instructions with which it was given did not constitute reversible error, nevertheless, it possibly might have been so held in this case if considered in conjunction with the 12-juror issue.

Upon the government's motion, this Court granted reconsideration and has received further extensive written and oral argument. The Court was also informed of the decision of the Court of Appeals to reconsider *Chiantese* en banc, and this order has been delayed, pending receipt of the en banc decision in that case which, so far as this Court can tell, has prospective effect only.

The Court is now persuaded that decision by an eleven man jury was not error, and that a 12-man jury was properly waived, in the absence in this circuit of any requirement that the waiver be by the party only (not his attorney) and in written form, since this is a waiver of a statutory—not constitutional—right. However, the Court is further persuaded that the defendants either knew actually the substance of their rights, or committed the entire decision without regard thereto to their attorneys. What was lacking here was the element of allocution apparently required in another circuit.

The only other matter as to which a finding may be desirable is that defendants' lack of access to the contents of the so-called "white" box, for a limited period of time did not substantially impair their defense in this case, which finding the Court hereby makes.

For the above reasons, defendants' motions for new trial are OVERRULED and DENIED.

SO ORDERED, this 26 day of October, 1977.

/s/ CHARLES A. MOYE, JR.
United States District Judge

C-3

FILED IN CLERK'S OFFICE
AND A TRUE COPY CERTIFIED, THIS

10-27-77

BEN H. CARTER, Clerk

By: /s/ DELORES W. PAGE
Deputy Clerk

APPENDIX D

UNITED STATES of America,

Plaintiff-Appellee,

v.

Stanley SPIEGEL, Allen E. Perkins and Allan Holloway, *Defendants-Appellants.*

No. 78-5110.

United States Court of Appeals,

Fifth Circuit.

Oct. 18, 1979.

Defendants were convicted in the United States District Court for the Northern District of Georgia, Charles A. Moye, Jr., J., of various counts of mail fraud and conspiracy, and they appealed. The Court of Appeals, Gee, Circuit Judge, held that: (1) jury verdicts of mail fraud were supported by substantial evidence; (2) trial court did not commit reversible error by excusing a juror and continuing trial with only 11 jurors; (3) defense failed to show prejudice to them in trial court's action in dismissing two jurors during trial and replacing them with alternates when it was learned that the jurors knew one of the defendant's families, an issue which Government's voir dire failed to inquire about; (4) error made by trial court in giving erroneous *Mann* instruction to jury was not plain error; (5) trial court had jurisdiction to reconsider its grant of new trial to defendants and subsequently deny new trial and impose sentences, and (6) trial court's grant, and then denial, of motion for new trial was not an abuse of discretion and did not violate Speedy Trial Act.

Affirmed.

1. Post Office 49(11)

Evidence concerning activities of leasing corporation was sufficient to support jury's verdict of guilty in mail fraud prosecution. 18 U.S.C.A. § 1341.

2. Attorney and Client 77

Only where there is evidence of fraud or gross incompetence of an attorney or where an inherently personal right of fundamental importance is involved does the law require defendant to personally waive his or her rights.

3. Jury 150

Where defense counsel made tactical decision and urged trial court, over prosecution's protest, to excuse juror and continue trial with 11 jurors, defendants waived any objection that they might have had to proceeding with 11 jurors. U.S.C.A.Const. art. 3, § 2, cl. 3; Fed.Rules Crim. Proc. rule 23(b), 18 U.S.C.A.

4. Criminal Law 1166.16

Trial court's action in excusing two jurors during trial for cause based on facts that would have been known before selection but for Government's omission of question on voir dire did not prejudice defendants. Fed.Rules Crim.Proc. rule 24(c), 18 U.S.C.A.

5. Criminal Law 778(5)

Mann charge using phrase "unless the contrary appears from the evidence" is improper because it may operate to shift burden of proof on issue of criminal intent.

6. Criminal Law 1043(2)

Nebulous complaint made by defense counsel regarding alleged improper jury instruction in which defense

counsel failed to point out the exact wording of the instruction which was improper was not a proper objection and the plain error rule applied on appeal. Fed.Rules Crim.Proc. rule 52(b), 18 U.S.C.A.

7. Criminal Law 1038.1(6)

Error made by trial court in giving erroneous *Mann* instruction using phrase "unless the contrary appears from the evidence" was not plain error. Fed.Rules Crim. Proc. rule 52(b), 18 U.S.C.A.

8. Criminal Law 964

Even though brief in support of Government's motion for reconsideration of new trial was late under local rules of district, trial court had jurisdiction to reconsider its grant of new trial to defendants and subsequently denied new trial and imposed sentences.

9. Criminal Law 961

Trial court's action in granting, and then denying, defendants' motion for new trial was not an abuse of discretion.

10. Criminal Law 577.12(1)

Where Government's motion for reconsideration of grant of new trial was granted within 60 days, Speedy Trial Act was tolled. 18 U.S.C.A. § 3161(e).

Edward T. M. Garland, Mark J. Kadish, Atlanta, Ga., for Spiegel.

J. Roger Thompson, Frank J. Petrella, Atlanta, Ga., for Perkins and Holloway.

William P. Gaffney, Asst. U.S. Atty., Dept. of Justice, Atlanta, Ga., for plaintiff-appellee.

Appeals from the United States District Court for the Northern District of Georgia.

Before GODBOLD, GEE and RUBIN, Circuit Judges.

GEE, Circuit Judge:

Appellants were indicted and tried on 30 counts [1] of mail fraud under 18 U.S.C. § 1341, and one conspiracy count under 18 U.S.C. § 371. Following a trial lasting nine weeks, the jury found appellant Stanley Spiegel guilty of all 30 counts of mail fraud. Appellant Allan Holloway was found guilty of 25 counts of mail fraud; and appellant Allen Perkins was found guilty of one count of mail fraud and acquitted of all others. The jury acquitted all three of the conspiracy charges and acquitted two codefendants of all charges. Spiegel, Holloway, and Perkins appeal from their convictions. Appellant Spiegel's brief argues for reversal on 24 separate issues; the brief for Holloway and Perkins raises 15 issues. The transcript of proceedings in the trial court fills over 50 volumes. We granted additional time for oral argument and gave permission to file briefs more lengthy than usual.

It should be obvious that this is a complex case. Any summary of facts will be less revealing than an iceberg's proverbial tip. With that disclaimer, we now attempt to sketch the most important details while saving for our discussion of the more troubling issues a description of the events especially relevant to them.

Appellant Spiegel, a successful acquisition broker, bought the controlling interest in Coliseum Properties,

[1] The indictment alleged 32 counts; two were dismissed at the close of the government's case-in-chief.

Inc. (CPI) in October 1970 with notes totalling approximately $460,000. Spiegel and Holloway soon thereafter formed Leasing Corporation of America (LCA) as a CPI subsidiary. At about the same time, Spiegel and acquitted codefendant Joseph Lawson formed another CPI subsidiary, Auditing Services, Inc. (ASI). Holloway, through Holloway Enterprises, Inc. (HEI), contracted with CPI to sell franchises for both ASI and LCA.

LCA offered franchises to persons interested in entering the leasing business. Essentially, prospective dealers were told that LCA had access to 200 funding sources and could obtain financing for leases on almost any type of income-producing equipment, even on marginal lease applications. The sales pitch to prospective dealers furnished, amid other questionable information, the names and phone numbers of allegedly successful dealers. Franchise salesmen solicited a $2,500 down payments with a completed dealer application. Following approval of the application, the remainder of the $10,000 franchise fee became due. Dealers who paid in full received, by mail from Spiegel, a signed dealer agreement. A total of 34 LCA franchises were sold between December 1970 and December 1971; LCA received $365,000 in cash from those sales under its agreement with HEI that LCA and HEI would split the fees 60/40. Over 130 leases were submitted to LCA by dealers during 1971. Only four were placed successfully.

ASI offered computerized audits of utility expenses to businesses and industries. It sold franchises allowing solicitation of customer accounts in defined territories. Prospective dealers were told that utility rates from each dealer territory were programmed into the computer and that auditing by computer was the major advantage

offered by ASI. Businesses for whom audits were done were to pay 50 percent of any refunds or utility savings to the dealer, who then was to share half his profits with ASI. To aid its franchise sales, ASI used photographs of computer facilities depicting an RCA computer and, later, tours of another facility. As with LCA sales, prospects were furnished the names and addresses of purportedly successful dealers. ASI received over $650,000 as its share of the fees from 62 franchise sales in 1971; HEI received over $225,000. Franchisees submitted many auditing contracts, but few recoveries resulted, although ASI had represented that the recovery rate would be very high.

Appellant Perkins was a paid "singer" for both LCA and ASI; *i. e.*, he posed as a successful dealer and deceived prospective dealers by representing that he was receiving significant income from his "franchises." Spiegel and Holloway were aware of the use of "singers."

Evidence showed that LCA misrepresented the extent of its funding sources. Holloway prepared the LCA pitch book in Spiegel's presence, and Spiegel had ample opportunity to learn its contents. Spiegel confirmed, in a telephone call to a prospective dealer, that LCA could handle marginal paper and had 200 funding sources. Additionally, Spiegel sent backdated franchise agreements to "singers" Perkins and Jim Arnold knowing that no fees had been paid for their "franchises."

Spiegel and Holloway misrepresented the state of ASI's computer capability. Their computer expert told Spiegel in April 1971 that the rate structure of an entire utility company could not be programmed; analysis had to proceed one business at a time. When advised of this and when told such information would ruin the sales pitch, Spiegel indicated that ASI salesmen need not receive this

information. Despite advice that franchise sales should stop, owing to a backlog at the computer, sales continued. Spiegel also misrepresented to a dealer that ASI had leased three-fourths of the time available on an RCA computer at an annual cost of $500,000.

[1] From the foregoing and other facts proven at trial, we think it clear that the jury verdicts of fraud are supported by substantial evidence. We now proceed to consider the more serious points raised on appeal.

Eleven-Member Jury

Appellants contend that the trial court committed reversible error by excusing juror Suzanne Silver and continuing the trial with only eleven jurors. We disagree.

Two distinct provisions of the United States Constitution guarantee the right to a jury trial in criminal cases.[2] The Supreme Court declared in 1930 that the Constitution required a jury of precisely twelve persons unless this right was waived by defendant. *Patton v. United States*, 281 U.S. 276, 50 S.Ct. 253, 74 L.Ed. 854 (1930). The Federal Rules of Criminal Procedure, enacted in the 1940's, codified *Patton's* requirement of twelve.[3] Our first inquiry thus must be whether Rule 23(b) has been followed here.[4]

[2] U.S. Const. art. 3, § 2, cl. 3, provides: "The trial of all crimes . . . shall be by Jury . . . ." The sixth amendment states: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ."

[3] *See* Note of the Advisory Committee on Rules following Rule 23 in 18 U.S.C.A.

[4] Rule 23(b), Fed.R.Crim.P., reads as follows:

> Jury of Less Than Twelve. Juries shall be of 12 but at any time before verdict the parties may stipulate in writing with the approval of the court that the jury shall consist of any number less than 12 or that a valid verdict may be returned by a jury of less than 12 should the court find it necessary to excuse one or more jurors for any just cause after trial commences.

At a pretrial conference on June 3, 1974, attended by all counsel and appellant Spiegel, the question whether counsel and parties would be amenable to waiving the requirement of twelve jurors was first raised but not resolved. The jury was selected and sworn a week later, on June 10. After voir dire and before actual selection, all counsel for defendants stated, at side-bar, that their clients would waive the right to have twelve jurors.[5] Additionally, it was agreed at side-bar that two alternate jurors would be selected, despite the waiver, simply as a matter of preference. After a recess to discuss peremptory strikes and after the final selection, counsel for the government and for all defendants signed a written stipulation waiving the requirement of twelve jurors, and the trial judge announced in open court: "The court has received and approved the waiver of an alternate juror and the agreement to proceed with less than twelve in the event of necessity." There is nothing in the record to indicate conclusively that defense counsel conferred with their clients before signing the stipulation.

Soon after trial began, two jurors were excused, and the two alternates replaced them. Trial continued for approximately two more months. The government's case took seven weeks; defendants began theirs on August 5. Defendants wished to finish as soon as possible, since the jury was becoming restless and impatient. Defendant Spiegel was on the stand at the close of the day on Friday, August 9, his case complete except for cross-examination.

On Monday following the weekend recess, juror Silver did not report, owing to illness. Evidently the deputy clerk advised counsel of this new development before the

[5] There is some indication that the decision to waive was made in order to obtain five additional peremptory challenges.

judge entered the courtroom. On his arrival, the trial judge formally announced that juror Silver was ill, and he expressed uncertainty about when she would return. At that point, all defense counsel, in the presence of their clients, *requested* that trial continue with the remaining eleven jurors; government counsel objected. The trial court then excused the juror and stated in defendants' presence that trial would proceed with eleven. Again, it is difficult to ascertain whether appellants were consulted by their attorneys before the latter made their request to proceed. Much later, in overruling motions for new trial, the trial court stated that defendants "either knew actually the substance of their rights [to a twelve-person jury], or committed the entire decision without regard thereto to their attorneys." Thus, he made no explicit finding that defendants knew exactly what was being waived on either June 10 or August 12. Unquestionably, none gave personal assent in court to trial by eleven jurors.[6]

The real issue is whether Rule 23(b) allows counsel to waive a client's right to a jury of twelve in the absence of a finding that defendant either was consulted about the decision or personally and intelligently assented to fewer than twelve.[7]

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[6] We wish to emphasize here that no one suggests that defendants were displeased with their counsels' decisions to agree in advance to trial by less than twelve jurors and to proceed with eleven on August 12. Indeed, some defendants seem to have expressed elation, off the record, over juror Silver's dismissal.

[7] The requirement of a writing in Rule 23(b) is not at issue here, since it is clear that a defendant's oral consent given in open court satisfies the rule even where its requirements are strictly enforced. *See United States v. Smith*, 523 F.2d 788 (5th Cir. 1975), *cert. denied*, 424 U.S. 973, 96 S.Ct. 1475, 47 L.Ed.2d 742 (1976); *United States v. Guerrero-Peralta*, 446 F.2d 876 (9th Cir. 1971).

The language of Rule 23(b) departs substantially from that of Rule 23(a). The latter states:

> Trial by jury. Cases required to be tried by jury shall be so tried unless the defendant waives a jury trial in writing with the approval of the court and the consent of the government.

Rule 23(b), on the other hand, refers not to "the defendant" but to "the parties." [8] Several courts apparently are reluctant to give meaning to this difference and require the express, knowing, intelligent, *personal* consent of defendant to a stipulation that trial may proceed with fewer than twelve jurors. *See United States v. Taylor*, 498 F.2d 390 (6th Cir. 1974); *United States v. Guerrero-Peralta*, 446 F.2d 876 (9th Cir. 1971). Another court holds that Rule 23(b) is satisfied if counsel is shown to have consulted with the defendant before agreeing to proceed with eleven jurors. *United States v. Vega*, 447 F.2d 698 (2d Cir.), *cert. denied*, 404 U.S. 1038, 92 S.Ct. 712, 30 L.Ed.2d 730(1971). The Seventh Circuit, on the other hand, allowed counsel's signature on a stipulation consenting to fewer than twelve jurors to bind his client, despite the record's silence on the defendant's authorization or consent and even though counsel later objected to implementation of the stipulation. *United States v. Pacente*, 503 F.2d 543 (7th Cir.) (en banc), *cert. denied*, 419 U.S. 1048, 95 S.Ct. 623, 42 L.Ed.2d 642 (1974).

Precedent in our own circuit leaves us in some doubt as to which of the above lines of cases we should follow. In *Horne v. United States*, 264 F.2d 40 (5th Cir.), *cert. denied*, 360 U.S. 934, 79 S.Ct. 1460, 3 L.Ed.2d 1549 (1959), a collateral proceeding under 28 U.S.C. § 2255, defendant was held to have waived his right to twelve jurors through

[8] *See* note 4, *supra*.

acts of his *counsel*, who first agreed to begin trial without alternate jurors, then stipulated in advance that the defense would be willing to proceed with fewer than twelve if any jurors became unable to continue, and finally agreed to the dismissal of a sick juror when the occasion in fact arose. The *Horne* court found no evidence of defendant's express consent to any of these actions by counsel but stated that defendant, although "unaware of the exact colloquy between Court and counsel, knew that the matter was discussed . . . and made no objection." *Id.* at 42. In those circumstances, which are very like ours here, the trial court "had every right to conclude that the action openly taken on both occasions by petitioner's counsel . . . was, as in the usual case, the act of petitioner." *Id.* at 43 (citations omitted).

[2] This court in *Horne* reached the above holding with an eye toward both Rule 23(b) and *Patton's* constitutional equation of "jury" with twelve persons. Thus, we can infer from *Horne* that a waiver made by counsel of the right to a twelve-person jury after intelligent and deliberate discussion in open court satisfies Rule 23(b) and passes constitutional muster.[9] This court later followed *Horne*

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[9] A recent development has, if anything, strengthened *Horne's* holding. *Williams v. Florida*, 399 U.S. 78, 90 S.Ct. 1893, 26 L.Ed.2d 446 (1970), in holding that the fourteenth amendment does not require *states* to provide twelve-person juries, cast doubt via broad dicta on whether the Constitution mandates twelve-person juries in federal court and perhaps overruled *Patton* sub silentio. Even if the number twelve is still constitutionally dictated, however, we find numerous circumstances in which actions by counsel to waive constitutional rights have bound their clients. *See, e. g., Estelle v. Williams*, 425 U.S. 501, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976) (waiver by counsel of fourteenth amendment guarantee that accused cannot be compelled to stand trial in prison garb); *Henry v. Mississippi*, 379 U.S. 443, 85 S.Ct. 564, 13 L.Ed.2d 408 (1965) (deliberate choice by counsel to delay objection to tainted evidence may waive defendant's rights under the fourth amendment); *Winters v. Cook*, 489 F.2d 174

without discussion in a direct appeal. *Beatty v. United States*, 377 F.2d 181 (5th Cir.), *rev'd on other grounds*, 389 U.S. 45, 88 S.Ct. 234, 19 L.Ed.2d 48 (1967).

Only our recent decision in *United States v. Smith*, 523 F.2d 788 (5th Cir. 1975), *cert. denied*, 424 U.S. 973, 96 S.Ct. 1475, 47 L.Ed.2d 742 (1976), stands in the way of our holding that the agreements entered into by counsel in this case satisfy Rule 23(b). *Smith* appears to require the express, personal consent of the defendant before a jury of less than twelve can convict; *i. e.*, the court followed the Ninth and Sixth Circuits. However, *Smith* overlooked *Beatty* and *Williams v. Florida* entirely, and *Horne's* precedent apparently was thought not to be on point. *See* 523 F.2d at 791 n. 1.

[3] We are reluctant to find that *Smith*, through possible inadvertence or inadequate briefing, overruled *Horne* and *Beatty* sub silentio. Yet even if we assume that to be so, the facts of this case sufficiently distinguish it from

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(5th Cir. 1973) (intentional, strategic waiver by counsel of defendant's right to object to racial composition of jury).

Winters relates a basic truth: we guard so zealously the right to counsel because

> most defendants are untutored in the law and are unqualified to conduct their own defense. It would be incongruous to reflexively allow a defendant such as Winters to void his conviction when his privately-employed lawyer did what he was retained to do—use his skill and knowledge of the law to further the best interests of his client—because the lawyer did not first reason out his every action with his client and obtain his knowing agreement.

Id. at 177–78. Only where there is evidence of fraud or gross incompetence by an attorney—which is not an issue here—or where "an inherently personal right of fundamental importance is involved," *id.* at 178, does the law require defendant to personally waive his or her rights. *Horne*, even before *Williams v. Florida*, indicated that defendants sometimes could speak through counsel in waiving the right to twelve-person juries. This in no way suggests that counsel may waive the right to a *jury trial* for their clients.

Smith and require a finding of waiver. Appellants here affirmatively *sought*, as a matter of trial strategy, through counsel, the dismissal of juror Silver. In *Smith*, defense counsel and defendant seemed reluctant to implement the stipulation when the need for it arose; this court thus was forced to examine defendant's consent closely, since no strategy by defendant appeared to be involved. Counsel here made a tactical decision and urged it on the trial judge over the prosecution's protest; that conduct served to waive any objection the appellants might have had to proceeding with eleven jurors. We would also point out that, if we were to find the dismissal to be error under *Smith*, we would also be constrained to call it invited error. *See United States v. Lewis*, 524 F.2d 991 (5th Cir. 1975), *cert. denied*, 425 U.S. 938, 96 S.Ct. 1673, 48 L.Ed.2d 180 (1976).

Replacement of Two Jurors with Alternates

The government's voir dire questions failed to inquire whether any on the jury panel knew the defendants or their families. On June 11, 1974, the day after the jury was sworn, the deputy clerk advised the trial judge that juror Helen McSwain had told him that she knew appellant Spiegel. The trial judge in turn announced this in open court; trial proceeded without objection. The next day, the arrival of Spiegel's family at court prompted juror McSwain to communicate directly with the trial judge at the noon recess concerning her relationship with the Spiegels. The judge then asked her in open court, out of the jury's presence, to relate her feelings about serving on the jury. She said that she knew the Spiegels and would rather not be on the jury since she would be uncomfort-

able making a decision in the case.[10] She testified that she had told other jurors of her acquaintanceship.

The court then questioned another juror, Harvey Jones, who stated that he had known Spiegel's daughter in college; he too, had mentioned that fact to other jurors.

The trial judge and counsel spent the afternoon of June 12 researching the proper course of action to take under the circumstances; then, and again the next day, they discussed the issues at length. At last the court excused McSwain because he believed her discomfort would render it difficult for her to be an impartial juror. Jones stated that his relationship with the daughter was not a close one, whereupon counsel for Spiegel informed the court that Jones in fact had dated Leslie Spiegel more than once. The court then excused Jones and replaced him and McSwain with two alternate jurors.

Rule 24(c), Fed.R.Crim.P., governs a trial judge's action in such circumstances. It states in pertinent part:

> Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retires to consider its verdict, become or are found to be unable or disqualified to perform their duties.

It is clear that the court carefully considered the effect of the jurors' relationships with the Spiegels on their ability to remain impartial. The decisions of this court and other circuits indicate that Rule 24(c) empowers a trial judge, exercising sound discretion, to "remove a juror and replace him with an alternate juror whenever facts are presented which convince the trial judge that the

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[10] Further questioning by the trial court on June 13, after he excused her, brought out the fact that Ms. McSwain had been a close friend of Spiegel's daughter, Leslie, in junior high school and had been a guest in the Spiegel home.

juror's ability to perform his duty as a juror is impaired." *United States v. Smith*, 550 F.2d 277, 285 (5th Cir.), *cert. denied, sub nom. Wallace v. United States*, 434 U.S. 841, 98 S.Ct. 138, 54 L.Ed.2d 105 (1977) (quoting from *United States v. Cameron*, 464 F.2d 333, 335 (3d Cir. 1972); *see also, e. g., United States v. Brown*, 571 F.2d 980 (6th Cir. 1978); *United States v. Jones*, 534 F.2d 1344 (9th Cir. 1976); *United States v. Domenech*, 476 F.2d 1229 (2d Cir. 1973).

None of the cases cited above dealt with the situation presented with McSwain: excusal of a juror during trial for cause based on facts that would have been known before selection but for the *government's* omission of a question on voir dire.[11] Rule 24(c) does not explicitly require that jurors be retained in that circumstance, however, and we believe precedent indicates that the trial judge's discretion is broad enough to cover this case.

Assuming arguendo that the trial judge erred, at least in dismissing Jones, who insisted that his relationship with Leslie Spiegel would not prejudice his judgment,[12] we still must uphold the court's action absent a showing of prejudice to defendants in the substitution. *United States v. Bad Cob*, 560 F.2d 877 (8th Cir. 1977); *United States v. Floyd*, 496 F.2d 982 (2d Cir. 1974).

Counsel for defendants contended at trial, and renew the contention here, that dismissal of McSwain and Jones would prejudice the rest of the jury against defendants

[11] Questioning of Jones on June 13 revealed that he was unaware that he knew anyone in the case until he saw defendant's daughter Leslie come into the courtroom the previous day. Thus, the government's failure at voir dire to inquire into the panel's knowledge of the defendants is irrelevant as it concerns juror Jones.

[12] Jones' lack of complete honesty probably led the judge, quite properly, to give little credibility to his protestations of fairness.

by causing the jury to believe the defense guilty of impropriety in not advising the court of the two jurors' knowledge of the Spiegels. In light of the fact that some jurors knew the reason for the substitutions, defense counsel requested that the jury be told that what had occurred did not reflect badly on the defense and that the replacement was due to prosecutorial error. Appellants also contend that the court should have questioned the rest of the jury about whether they had become prejudiced as a result of the replacements.

The trial judge must walk a tightrope in circumstances like these. Rule 24(c) requires the judge to remove jurors when it appears that they cannot perform their duties properly. If, as here, other jurors have some knowledge of what the problem is, the judge must somehow ascertain whether the panel is prejudiced without intimidating them or infecting them with erroneous impressions. We believe the trial court successfully negotiated the tightrope here by his questions to the excused jurors and with his instruction:

> Ladies and gentlemen of the jury, two jurors, Mr. Jones and Ms. McSwain, brought to the Court's attention voluntarily and out of a regard for their oaths as jurors matters occurring—a situation affecting knowledge which came to their attention after the jury had been selected and we have excused them and placed the two alternate jurors in their place. The Court wishes to emphasize that what the two jurors did was with entire propriety and commendable and in accordance with their oaths as jurors and the Court knows that each of you jurors are equally faithful to your oaths as jurors.

A further instruction on defense propriety or prosecutorial omissions, or questioning of the panel, might have in-

jected the very prejudice everyone sought to avoid. *See United States v. Brown*, 571 F.2d 980 (6th Cir. 1978).

[4] We would also point out that the defense, concerned though it was over jury prejudice, failed when given an opportunity after the verdict to question jurors about the effects on them of the dismissal of the two jurors.[13] Thus, we must hold that the defense has failed to show prejudice to them, and we will presume none.

Mann Charge

The trial judge gave an erroneous instruction to the jury; it read:

> Now it is reasonable to infer that a person ordinarily intends the natural and probable consequences of acts knowingly done or knowingly omitted and, *unless the contrary appears from the evidence*, you, the jury, may draw the inference that the accused whose case you are considering intended all the consequences which one standing in like circumstances and possessing like knowledge should reasonably have expected to result from any act knowingly done or knowingly omitted by the accused.

(emphasis added). We have condemned the use of the italicized words on numerous occasions, beginning with *Mann v. United States*, 319 F.2d 404 (5th Cir. 1963), *cert. denied*, 375 U.S. 986, 84 S.Ct. 520, 11 L.Ed.2d 474 (1964). The long history of some trial courts' continued use of the *Mann* charge, and our occasional affirmances despite

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[13] When the trial judge declines to question jurors upon the replacement of one of their number with an alternate, defense counsel may always poll the jury after the verdict. *United States v. Brown*, *supra* at 990 & n. 10. The trial judge, after the jury was polled and before it was dismissed, asked if counsel or the parties wished the court to undertake any further inquiry. From the silent record, we presume a negative answer.

it, are detailed in *United States v. Chiantese*, 560 F.2d 1244 (5th Cir. 1977) (en banc). In *Chiantese* we declared that we would no longer absolve such errors by looking at the whole charge to find corrective language. However, *Chiantese* is to be applied only prospectively, *id.* at 1256, and does not govern here.

Appellants make several arguments. First, they contend that *Sandstrom v. Montana*, ____ U.S. ____, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979), establishes a constitutional rule against the use of this charge and thus requires us to apply *Chiantese* retroactively. Second, they maintain that a proper objection was made to the charge, rendering the "plain error" rule, Fed.R.Crim.P. 52(b), inapplicable. Last, they argue that even under pre-*Chiantese* law, the prejudicial language of the *Mann* charge was not cured here by additional instructions, since the latter were not given immediately before or after the questioned paragraph.

[5] We disapproved of the instruction at issue because it may operate to shift the burden of proof on the issue of criminal intent.[14] In June of this year, the United States Supreme Court declared that a burden-shifting charge intrudes on an accused's due-process right not to be convicted except on proof by the government beyond a reasonable doubt of every element of the crime charged. *Sandstrom v. Montana, supra.*

The charge used in *Sandstrom*, however, is distinguishable from that in the case before us. At issue in *Sandstrom* was whether defendant purposefully or knowingly killed

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[14] "When the words, 'so unless the contrary appears from the evidence' were introduced, the burden of proof was thereupon shifted from the prosecution to the defendant to prove lack of intent." *Mann, supra* at 409 (quoted in *Chiantese, supra* at 1246).

another; the charge read: "*the law presumes* that a person intends the ordinary consequences of his voluntary acts." 99 S.Ct. at 2453 (emphasis added). Here the court merely informed the jury that they *might* infer intent from knowing acts; this is clearly correct. See the recommended instruction in *Chiantese*, 560 F.2d at 1255. The only phrase used here that was prohibited by *Chiantese* involves "unless the contrary appears from the evidence," and such a phrase was neither used nor discussed in *Sandstrom*. Thus, *Sandstrom* does not mandate a finding that the charge at issue is unconstitutional.

Even were we to assume that *Sandstrom* found constitutional deficiencies in all burden-shifting charges, we still would hesitate to, in effect, apply *Chiantese* retroactively. The criteria to be used in deciding whether to apply retrospectively a new constitutional rule of criminal procedures are spelled out in *Adams v. Illinois*, 405 U.S. 278, 92 S.Ct. 916, 31 L.Ed.2d 202 (1972). Decisions defining fundamental rights often are given only prospective application; for example, the rule that requires the states to provide jury trials in serious criminal cases was not given retroactive effect, *see De Stefano v. Woods*, 392 U.S. 631, 88 S.Ct. 2093, 20 L.Ed.2d 1308 (1968); nor was the decision that established the right to counsel at a lineup, *see Foster v. California*, 394 U.S. 440, 89 S.Ct. 1127, 22 L.Ed.2d 402 (1969).

This court, sitting en banc, made the explicit decision *not* to apply *Chiantese* retroactively, even in the case then under scrutiny. In so doing, the en banc court weighed carefully the wisdom of retroactive application, including the effect of such on the orderly administration of justice, before deciding that the standards announced in *Chiantese* would take effect 90 days after the opinion's date. 560

F.2d at 1255. We see nothing in *Sandstrom* that requires us to abrogate that clear holding.[15]

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[15] We note that the Court in *Sandstrom* found that "the law presumes" charges might denote a conclusive or persuasion-shifting presumption, and a jury hearing such a charge might believe that they were directed to find against the defendant or that the defendant must negate criminal intent. ____ U.S. at ____ - ____, 99 S.Ct. at 2455-60, 61 L.Ed.2d at 45-51. The Court further held that these potential interpretations were not "cured" by other instructions on the presumption of the defendant's innocence and on the state's burden of proof. The Court reasoned that because a conclusive or burden-shifting presumption could be viewed as "a means by which proof beyond a reasonable doubt as to intent could be satisfied," the presumption was "not rhetorically inconsistent" with the more general instructions. *Id.* at ____, 99 S.Ct. at 2456 n.7, 61 L.Ed.2d at 47 n.7. Thus, we might infer that *Sandstrom* in effect requires the prophylactic rule we laid down in *Chiantese:* that other instructions on the proper burden of proof will be disregarded if a *Mann* charge is given. 560 F.2d at 1255. If this inference is correct, several of our previous decisions, under which we decide this case, would not pass constitutional muster under *Sandstrom. See, e. g., United States v. Chiantese,* 582 F.2d 974 (5th Cir. 1978) (panel decision on remand from en banc consideration); *United States v. Duke,* 527 F.2d 386 (5th Cir. 1976). Or we might adopt a contrary inference, that "other instructions" that *are* "rhetorically inconsistent with a conclusive or burden-shifting presumption" can serve to cure it. *Sandstrom, supra* at ____, 99 S.Ct. at 2456 n.7, 61 L.Ed.2d at 47 n.7. The hair-splitting, case-by-case analysis that this would entail merely serves to emphasize the wisdom of *Chiantese's* prophylactic rule.

But where, as here, the presumption at issue is not even arguably conclusive, we decline to find that the *Chiantese* rule is required by the Constitution. Notably, the Court in *Sandstrom* distinguished two lines of cases in which the undesirable effects of presumptions were ameliorated in part by general instructions similar to the ones found here. ____ U.S. at ____, 99 S.Ct. at 2457 n.9, 61 L.Ed.2d at 48 n.9. The Court found that one line, culminating in *Ulster County Court v. Allen,* ____ U.S. ____, 99 S.Ct. 2213, 60 L.Ed.2d 777 (1979), did not involve "presumptions of the conclusive or persuasion-shifting variety," *Sandstrom, supra* at 2457 n.9, 61 L.Ed.2d at 48 n.9; the charge in *Allen,* however, placed at least as much of a burden on the defendant as the one at issue here. More significantly, the *Sandstrom* Court held that it was not bound by *Agnew v. United States,* 165 U.S. 36, 17 S.Ct. 235, 41 L.Ed. 624 (1897), in which the jury was charged that there was a presumption that required the defendant to prove his lack of intent beyond a reasonable doubt, in part on the ground that the jury was also expressly told that the presumption was not

Before we proceed with our application of pre-*Chiantese* law, we must dispose of defendants' contention that the plain error rule is inapplicable. All briefs for appellants concede that no objection was made to the *Mann* charge. However, counsel at oral argument reversed position and argued that an objection was made.

[6] The charge to the jury covers 54 pages of the transcript. Soon after the jury retired, counsel for some of the defendants attempted to object to an instruction that he believed placed the burden of proof on defendants, but he did not point with specificity to the portion of the charge he found objectionable, even when invited to do so by the trial judge.[16] In these circumstances, we cannot

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conclusive. Moreover, even if *Sandstrom* did require the *Chiantese* prophylactic rule, we would refuse to apply it retroactively for the reasons we have cited above. Thus, at least the pre-*Chiantese* decisions on curative instructions that involve nonconclusive *Mann*-type charges are controlling in this case.

[16] DEFENSE COUNSEL: The other position of the Court, I got the impression and I'm not sure—the Court at one time said—and I'm not sure—which was that the defendant had something to prove and I think the Court somewhat said to the jury that the defendant had some sort of burden to prove which was a particular position. I don't recall the exact wording.

THE COURT: If you could call my attention to it I would certainly change that. I thought I had said three times or four that the burden—that the defendant has no burden to produce any witnesses or do anything.

DEFENSE COUNSEL: I know. The Court has said that. But there was one place in the charge it indicated if you believe the defendant did this or that, then the defendant must prove it to you. And I thought it was putting the burden on the defendant.

THE COURT: If you will—

DEFENSE COUNSEL: I don't recall where—

THE COURT: If the statement was made it was inadvertent, but I don't know where it was made, but I would correct it.

DEFENSE COUNSEL: I do not know.

We assume arguendo that this "objection," if properly made, would preserve the error for all defendants.

hold this nebulous complaint to be a proper objection. It is clear that the court below was more than willing to correct its mistake; it was counsel's duty to single out the erroneous language in order to facilitate its correction. As it was, the judge was left unenlightened; therefore, the plain error rule applies. *See* Fed.R.Crim.P. 52(b).

Under pre-*Chiantese* law, we look to the whole set of instructions to determine whether the *Mann* charge could have misled the jury. Appellants emphasize that *United States v. Schilleci*, 545 F.2d 519 (5th Cir. 1977), found error because the instruction on the government's having the burden of proof did not follow the *Mann* language. We find *Schilleci* not controlling. In the first place, a charge emphasizing the government's burden does follow the *Mann*-type charge in the case at bar.[17] Similar corrective language also appears several times before the erroneous instruction.[18] Moreover, reliance on *Schilleci* is misplaced because reversal there was not based solely on an erroneous *Mann* charge.

On remand to the original panel, prejudice in the charge at issue in *Chiantese*, which was identical to the language used here, was found to be cured by proper instructions given before, but in close proximity, to the *Mann* charge. *United States v. Chiantese*, 582 F.2d at 976-77. We think the instructions here were at least as adequate as those in *Chiantese*.

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[17] The *Mann* language is at 47 T. 45; the court stated at 47 T. 52:

> [T]he burden is upon the Government to prove beyond a reasonable doubt the guilt of each defendant as to each count for which he is on trial before you and you must acquit—that is, find not guilty—each defendant as to each count where you find, if you do so, that the Government has failed to carry that burden of proof.

[18] The court properly instructed the jury regarding the burden of proof and the presumption of innocence.

[7] The *Chiantese* II court also found ample evidence of objective conduct that would support a jury finding of intent despite an erroneous charge, *id.* at 977; we, too, find the evidence of objective conduct sufficient to sustain a guilty verdict despite the *Mann* language. The error made by the trial court is not plain error; thus, we must reject appellants' contentions regarding the court's charge.

The Trial Court's Grant, Then Denial, of Motion for New Trial

The post-verdict maneuvers in this case were protracted and complex. The verdicts came in on August 17, 1974. The trial judge allowed appellants to delay their filing of amplified motions for new trial until the lengthy transcript could be obtained from the court reporter; such motions finally were filed on June 11, 1976. More delay followed, during which evidence was heard on, among other things, the eleven-member jury issue. The court, on its own, discovered the first panel decision in *United States v. Chiantese*, 546 F.2d 135 (5th Cir. 1977), and granted appellants' motion for new trial on April 14, 1977, primarily on the eleven-juror issue but also because the first *Chiantese* opinion appeared to require automatic reversal for use of the *Mann* charge. See discussion above. The government filed a motion for reconsideration within seven days, although its brief in support was not forthcoming until May 26, 1977. Appellants contested this motion and complained of the untimely brief to no avail. The government's brief focused on the eleven-juror question and also informed the court that *Chiantese* had been granted rehearing en banc.

On June 8, 1977, the trial court granted the motion for reconsideration and vacated its previous order granting a new trial. After the en banc *Chiantese* decision in October, 560 F.2d 1244 (5th Cir. 1977), the court overruled the motions for new trial. No judgment of conviction had been entered up to this time. Sentences were imposed in February 1978.

Appellants make alternate contentions: either the trial court lacked jurisdiction to impose sentences following its grant of new trial, or the court abused its discretion in vacating the order granting a new trial and deprived appellants of their due process rights to a speedy trial.

Cases are scarce that bear on the first contention, and none are directly apposite.[19] We held, in *United States v. Spinella*, 506 F.2d 426 (5th Cir. 1975), that once a second trial has begun the court has no power to vacate its order granting a new trial and reinstate the conviction obtained in the first trial. The government urges us to accept *Spinella's* broad obverse, that the district court can alter new trial orders and revive convictions until jeopardy attaches in the second trial. Appellants, on the other hand, point to language in *Spinella* that states, "The order granting the new trial necessarily has the effect of vacating the *judgment of conviction* rendered in the earlier trial," *id.* at 430 (emphasis added); therefore, the trial court lacked power later to reinstate the judgment. *Id.* They ask us to hold that the order granting a new trial here rendered the *jury verdict* null and void, even though a judgment of conviction had never been entered and despite this case's other factual dissimilarities to *Spinella*.

[19] *See United States v. Smith*, 331 U.S. 469, 67 S.Ct. 1330, 91 L.Ed. 1610 (1947), which holds only that the trial court may not grant a new trial after the court of appeals has affirmed a conviction on direct appeal.

[8] We reject appellants' contention, yet we need not go as far as the government urges. Suffice it to say that on these facts the trial court had jurisdiction to reconsider its grant of new trial. The government's motion for reconsideration was timely; while its brief was late under the local rules of the district, the court's failure to insist on compliance with such rules does not deprive it of jurisdiction. *See Schacht v. United States*, 398 U.S. 58, 64, 90 S.Ct. 1555, 26 L.Ed.2d 44 (1970) (untimely filing of petition for certiorari). Compliance is a matter for the court's discretion, which was not abused here. The *Chiantese* issue had not been briefed fully at the time the order granting a new trial was entered; that order did not vacate a judgment of conviction, and we hold that it did not render the jury verdict a nullity.

We find support in our holding from events transpiring after imposition of sentences. Appellant Spiegel petitioned us for mandamus on the ground that the trial court lacked jurisdiction to impose sentence. We denied his petition, *In re Stanley Spiegel*, No. 78-1764 (5th Cir., June 6, 1978) (unpublished), and the Supreme Court denied certiorari. *Spiegel v. Moye*, 439 U.S. 861, 99 S.Ct. 181, 58 L.Ed.2d 170 (1978).

[9,10] Appellants' alternate contention based on abuse of discretion and violation of the right to a speedy trial fares no better. As we state above, the trial court acted within its discretion; the government's motion for reconsideration was granted within sixty days of the grant of new trial, and the grant of the government's motion served to toll the Speedy Trial Act, 18 U.S.C. § 3161(e) (Supp. V 1975).

We find no arguable merit in the other issues raised by appellants. Accordingly, we affirm the convictions below.

AFFIRMED.

APPENDIX E

[Filed in Clerk's Office January 3, 1979;
Gilbert F. Ganucheau, Clerk]

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
OFFICE OF THE CLERK
JANUARY 2, 1980

TO ALL PARTIES LISTED BELOW:

NO. 78-5110 – U.S.A. -vs- Stanley Spiegel, Allen E. Perkins, and Allan Holloway

Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

GILBERT F. GANUCHEAU, Clerk

By CLAUDIA RIDER
Deputy Clerk

cc: Messrs. Edward T. M. Garland
Mark J. Kadish
Messrs. J. Roger Thompson
Frank J. Petrella
Mr. William P. Gaffney

APPENDIX F

[Filed in Open Court June 10, 1974,
Ben H. Carter, Clerk; By P.J.E., Deputy Clerk.]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES -vs- STANLEY SPIEGEL, et al	CASE NO. 27972

STIPULATION

It is agreed that the selection of an alternate juror in the trial of this case is waived, and that in the event of disability, disqualification or absence for providential reasons of a juror or jurors impaneled herein the trial may proceed before the remaining jurors until a verdict is reached.

This the 10 day of June, 1974.

/s/ DAVID H. COFFMAN

/s/ WILLIAM P. GAFFNEY
Attorney for the Plaintiff

/s/ EDWARD T. M. GARLAND
Attorney for the Defendant Spiegel

/s/ F. CARTER TATE
Attorney for the Defendant Lawson

/s/ JOHN MCQUIGAN
Attorney for Defendants A. Holloway, M. Holloway and Perkins

APPROVED
This June 10, 1974

/s/ CHARLES A. MOYE, JR.
United States District Judge

APPENDIX G

AFFIDAVIT

I, EDWARD T. M. GARLAND, being duly sworn, depose and state as follows:

1.

I am an attorney-at-law and a member of the State Bar of Georgia. I practice at 1012 Candler Building, Atlanta, Georgia 30303.

2.

During the trial involving the matter of *United States v. Stanley Spiegel, et al,* which commenced on June 10, 1974, I represented Stanley Spiegel.

3.

On June 10, 1974, I executed a Stipulation waiving selection of an alternate juror and waiving of the twelfth juror if the twelfth juror became disabled or disqualified. A copy of this Stipulation signed by me, the other defense counsel, Your Honor, and the two Government prosecutors is attached to my Affidavit as Exhibit A.

4.

I have no specific recollection that I discussed this Stipulation with Defendant Spiegel prior to my execution of this document.

5.

On August 12, 1974, upon arriving at the Courtroom, I was advised that a juror was ill. I have reviewed the August 12, 1974 transcript and it reflects that this matter was considered by Your Honor for only a few short mo-

ments. I stated, in essence, that I was ready to proceed with the case and take a verdict from the eleven remaining jurors. I have no specific recollection that I discussed with Defendant Spiegel, prior to the Court excusing twelve. I do not recall obtaining the personal waiver of Mr. Spiegel to proceed with the eleven remaining jurors. Indeed, I am unable to recall little, if any, discussion with him about the illness of the juror.

6.

I have reviewed the Affidavit of F. Carter Tate, counsel for then Co-defendant Joseph W. Lawson. With reference to his statement in Paragraph 3 of his Affidavit that there were discussions with counsel and parties relating to the tactical question of reducing the jury to eleven, I am presently unable to recall any such discussions. My best recollection is that the decision to proceed with the trial with the eleven remaining jurors was a decision of counsel and not of the defendants.

7.

The record itself demonstrates the swiftness with which the Court moved to excuse the ill juror and the transcript further reflects that there was no recess taken by any counsel for discussions with the various defendants. As I recall, the span of time between being informed that the juror was ill and the Bench conference reported in the August 12, 1974 transcript was quite short, leaving virtually no time for any discussions about tactics.

8.

I have also heard Your Honor state in open court at the last hearings in this case that the Court has a visual image of me and Defendant Spiegel conferring on this

matter. I have no such recollection. It is my observation that both the Court and Mr. Tate may be confusing the August 12, 1974 juror excusal with the excusal of the two other jurors much earlier in the trial. On this occasion, June 12, 1974, the record reflects a great amount of colloquy between Your Honor and all counsel. On this occasion, I do remember conferencing with Defendant Spiegel.

9.

On August 12, 1974, when the twelfth juror was excused for illness, I can unequivocally state to the Court that I did not then realize that the importance that Rule 23, Federal Rules of Criminal Procedure, would later play in this case. Although I am an experienced trial lawyer, I had never been confronted with the factual situation which is now before the Court. Indeed, the issue that we now raise before the Court was brought to my attention many months after the trial had ended by my Associates, Mark J. Kadish and Frank Joseph Petrella, who had apparently received some inquiry from Defendant Spiegel about the ramifications of a jury verdict returned by eleven jurors.

_____

EDWARD T. M. GARLAND

Sworn to and subscribed before me,
this _____ day of February, 1977.

_____

Notary Public

APPENDIX H

May 22, 1975

Mr. Stanley Spiegel
525 Park Avenue
New York, New York 10021

Dear Stanley:

Enclosed please find the following items:

(1) Page 8 of your docket sheet, showing the verbal waiver of the twelfth juror.

(2) The *Horne*, *Ricks* and *Guerrero-Peratta* cases.

(3) The transcript from August 12, showing the verbal waiver. As you can see, I enclosed the entire discussion and aftermath up to the time that you retook the stand on cross-examination. The record does not show your presence in the Courtroom.

(4) The transcript of the meeting of January 24, 1973, involving Ted Worozbyt, Bruce Kirwin and Judge Moye.

(5) The *Elder v. United States* case which you requested.

Incidentally, I attempted to contact Mr. Lesar in Washington to no avail. I will continue in this effort.

I will fully research the Rule 23(b) concept and report my findings to you as quickly as possible.

Sincerely,

/s/ FRANK PETRELLA
FRANK PETRELLA

FP:sb
Enclosures

APPENDIX I

CIRCUITS REQUIRING DEFENDANT'S KNOWING, INTELLIGENT AND EXPRESS CONSENT TO JURY OF LESS THAN TWELVE

Second Circuit
United States v. Vega, 447 F.2d 698 (1971).

Fourth Circuit
United States v. Virginia Erection, 335 F.2d 868 (1964).

Sixth Circuit
United States v. Lane, 479 F.2d 1134 (1973).
United States v. Taylor, 498 F.2d 390 (1974).

Ninth Circuit
United States v. Guerrero-Peralta, 446 F.2d 876 (1971).
United States v. Reyes, 603 F.2d 69 (1979).

Tenth Circuit
Fowler v. Hunter, 164 F.2d 668 (1947).

D. C. Circuit
United States v. Vicks, 475 F.2d 1326 (1973).

CIRCUITS NOT REQUIRING DEFENDANT'S KNOWING, INTELLIGENT AND EXPRESS CONSENT TO JURY OF LESS THAN TWELVE

Fifth Circuit
United States v. Spiegel, 604 F.2d 961 (1979).

Seventh Circuit
United States v. Pacente, 503 F.2d 543 (1974).